SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1081

THE LONG ISLAND COLLEGE HOSPITAL,
Petitioner,

against

NEW YORK STATE LABOR RELATIONS BOARD,

and

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED SERVICE EMPLOYEES UNION, SEIU, AFL-CIO,
Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner, The Long Island College Hospital ("Hospital"), submits this brief pursuant to this Court's Rule 24(4) in reply to the arguments the New York State Labor Relations Board ("Labor Board") first raised in its brief in opposition to the Hospital's petition for a writ of certiorari.

ARGUMENT

POINT I

The Hospital's petition for a writ of certiorari satisfies the requirements of Rule 23(1)(f).

The Labor Board's allegation that the Hospital's petition fails to comply with Rule 23(1)(f) in that the petition fails to specify details as to time, place and manner in which the federal questions sought to be reviewed were raised is totally without merit.

On the contrary, the Hospital, by making its equal protection argument to the Labor Board's Trial Examiner at page 20 of its brief, preserved its right to have this Court review that argument. The Hospital's brief to the Trial Examiner was its first opportunity to raise this argument, which it made as follows:

> "Everyone agrees that a hospital is probably the most integrated of all operations. For this reason, the Board's stated policy is to avoid 'over-compartmentalization.'* The Board's ordering of a self-determination election for the non-professional maintenance employees of The Long Island College Hospital is patently inconsistent with that policy. * * *"

The footnote to the text quoted above cited *Lawrence Hospital*, 28 SLRB 552, 554 (1965), and concluded:

> "The facts of that case, involving a petition by BCTC [Building and Construction Trades Council], are fundamentally indistinguishable from the facts of the case herein and in the *Lawrence* case, the Board

dismissed the petition, *raising a question of denial of equal protection of the laws to The Long Island College Hospital.*" (Emphasis added).

This satisfied Rule 23(1)(f).

The Trial Examiner, the Labor Board, the Appellate Division and the New York Court of Appeals each rejected the Hospital's argument under the equal protection clause of the Fourteenth Amendment.

Petitioner also raised at the earliest possible moment its other constitutional argument that the Labor Board denied the Hospital due process of law when its Trial Examiner had access to and used secret information in the Labor Board's "confidential" file, while he denied the Hospital's counsel the right to examine that secret information. In fact, petitioner annexed to its petition for a writ of certiorari as Appendix F (84a-97a)[1] excerpts from the transcript of testimony at the hearing that show conclusively that petitioner's counsel vehemently objected whenever the Trial Examiner dipped into the Labor Board's confidential file and when he denied petitioner's counsel the "right to examine the Board's file which [petitioner's counsel] requested many times" (App. F 93a).

The Hospital submits that where, as here, its Statement of the Case specifies that the federal question was raised at the hearing before the Trial Examiner, that counsel raised the question by timely objection to the Trial Examiner's conduct, and that the Trial Examiner overruled the

1. References in parentheses are to appendices and page numbers in the Hospital's petition for certiorari.

objection, the Hospital has fully complied with the requirements of Rule 23(1)(f).

Moreover, if the Hospital had not raised the constitutional questions it asks this Court to review at the earliest possible moment neither the Appellate Division nor the New York Court of Appeals would have, or indeed, could have, reviewed the constitutional issues for the first time on appeal. *Matter of Garfield,* 14 N.Y.2d 251, 200 N.E.2d 196 (1964); *Maloney* v. *Hearst Hotels Corp.,* 274 N.Y. 106, 8 N.E.2d 296 (1937); *Dodge* v. *Cornelius,* 168 N.Y. 242, 61 N.E. 244 (1901); *Wakeman* v. *Wilbur,* 147 N.Y. 657, 42 N.E. 341 (1895); *Sterrett* v. *Third National Bank of Buffalo,* 122 N.Y. 659, 25 N.E. 913 (1890); *Brown* v. *Brown,* 34 App. Div. 2d 727 (4th Dep't 1970). Here both courts passed on the constitutional issues.

The Court of Appeals' Order granting the Hospital's motion to amend the remittitur[2] shows that the Hospital presented and the Court of Appeals considered and rejected the two constitutional questions now before this Court. Therefore, implicit in the Court's decision to amend its remittitur is the conclusion that the Hospital preserved its right to an appeal on these questions by raising them at the earliest possible moment at the hearing before the Trial Examiner, before the Labor Board, and before the Appellate Division.

The Labor Board mistakenly cites Section 707(2) of the New York Labor Law (McKinney's 1965) to support its transparent argument that the Supreme Court should

2. The Court of Appeals' Order granting petitioner's motion to amend its remittitur is annexed to the petition for certiorari as Appendix E (82a-83a).

not review the constitutional issues raised in the Hospital's petition. The Hospital stated at page 10 of its petition that it clearly and expressly raised and argued the two constitutional issues presented to this Court before the Appellate Division and before the Court of Appeals. Neither court rejected these arguments based on the statute the Labor Board now cites. Since the courts below found that the Hospital adequately preserved its right to appeal the constitutional issues the Labor Board decided adversely to the Hospital, Section 707(2) fails to support the Labor Board's argument based on Rule 23(1)(f).

POINT II

The Hospital vigorously argued substantial constitutional questions based on the Fourteenth Amendment in the Court of Appeals.

The Labor Board asks the Court to believe that "[t]he Fourteenth Amendment was never mentioned as an issue which the Hospital was tendering to the Court of Appeals for determination. * * *" (LBB p. 7).[3] However, examination of the Hospital's main and answering briefs to the Court of Appeals shows that the Labor Board misstates the facts and that, contrary to the Labor Board's assertion, the Hospital vigorously pressed its constitutional arguments before the Court of Appeals as it had before the Appellate Division and the Labor Board.

In its main brief to the Court of Appeals, the Hospital devoted *no less than five pages* (pp. 40-44) to its argument

3. LBB p.—, refers to pages of the Labor Board's brief in opposition to the Hospital's petition for a writ of certiorari.

that the Labor Board denied the Hospital equal protection of the laws by applying different unit standards to similar types of institutions. Likewise, the Hospital set forth its due process argument involving the Trial Examiner's improper use of the Labor Board's confidential file in two pages (pp. 50-51) of the Hospital's main brief and, because it considered the Trial Examiner's conduct so inimical to due process, it forcefully argued the constitutional argument again in its answering and reply brief (p. 50).

Where, as here, the Hospital devoted a total of 8 pages of argument in its briefs to the Court of Appeals to the constitutional questions raised herein, there can be no doubt that the Hospital presented those issues for serious consideration by the Court of Appeals and that the Labor Board's characterization of the Hospital's treatment of the constitutional questions as "tossed in for whatever they were worth" is totally unfounded.

Most significantly, the Court of Appeals obviously considered the Hospital's constitutional arguments "serious" and "substantial." It said so by granting the Hospital's motion to amend the remittitur, and by stating that "* * * there were presented to and passed upon questions under the Constitution of the United States * * *" (App. E 82a).

POINT III

Counsel for the Hospital has consistently maintained the position that a separate unit of maintenance employees is inappropriate for purposes of collective bargaining at non-profitmaking hospitals.

In the instant case, the Hospital argued at every stage of the proceedings that the Board's certification of Local 144 as the exclusive bargaining representative of the Hospital's maintenance employees was invalid from the outset because, *inter alia,* a unit limited to the Hospital's maintenance employees is inappropriate for purposes of collective bargaining. As the Labor Board candidly admits at page 10, footnote 8 of its brief, counsel for the Long Island College Hospital made the same argument in *Society of The New York Hospital,* 34 SLRB 486 (1971). The Labor Board is somehow "fascinated" by the fact that, although the Labor Board unconstitutionally has found units of skilled maintenance employees at other non-profitmaking hospitals appropriate, New York Hospital insists that a different unit, one not limited to maintenance employees, must be found appropriate there.

We submit that the Long Island College Hospital's equal protection argument is perfectly consistent with the position New York Hospital has taken. What the Labor Board fails to grasp is the fact that both the Long Island College Hospital and the New York Hospital have always contended that a separate unit of maintenance employees is inappropriate for the purposes of collective bargaining at non-profitmaking hospitals.

No one is "playing tiddly winks" as the Labor Board suggests. The Hospital is protesting the Labor Board's denial of the Hospital's constitutional rights. If the Labor Board regards the Constitution as a game, this is all the more reason to grant the writ.

Conclusion

This Court ought to grant a writ of certiorari to review the judgment of the New York Court of Appeals.

Respectfully submitted,

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